Circuit Seeks Ideas on Managing Immigration Caseload

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The immigration brainstorming session *at the Ninth Circuit Court of Appeals drew 48 attorneys knowledgeable in immigration law.*

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The federal circuit court with the most immigration appeals is also the court most active in finding innovative new ways to expedite the legal process while continuing to respect the rights of would-be residents and asylum seekers.

Immigration Judge Dana Marks, *left, and LRCC Chair Peg Toledo*

An Immigration Insight

Panelists included U.S. Immigration Judge Dana Leigh Marks of San Francisco.

The United States Court of Appeals for the Ninth Circuit recently held a "brainstorming" session to solicit ideas from some of the most knowledgeable attorneys in the immigration field. Dozens of lawyers from five western states participated in the May 5 session, held at the James R. Browning U.S. Courthouse in San Francisco. The group included staff attorneys from the court of appeals, federal immigration judges, and representatives of law schools, legal aid societies, bar association groups, law firms specializing in immigration, and major corporate law firms with *pro bono* programs.

Their wide-ranging discussion produced a variety of ideas, including:

• More screening of cases to identify common legal issues, possibly done by lawyers in the field with guidance from the court;
• Greater and more efficient use of *pro bono* legal services;
• More training opportunities and wider distribution of training materials;
• More mentoring of inexperienced attorneys by veteran immigration counsel; and
• Closer scrutiny of negligent or incompetent immigration attorneys.

The program was organized by the Lawyer Representatives Coordinating Committee, which represents the federal bar in the Ninth Circuit's 15 judicial districts in nine western states and two Pacific Island jurisdictions. The group is chaired by Sacramento attorney Peg Carew Toledo of Orrick, Herrington & Sutcliffe LLP, who opened the session and introduced participants for a panel presentation. The subsequent discussion, which included a dozen attorneys participating by telephone and Internet, was moderated by attorney Ron Kerl of Pocatello, Idaho.

"The Ninth Circuit believes in bringing people together to work on common problems," said Ninth Circuit Chief Judge Mary M. Schroeder of Phoenix in welcoming the group. "I think this is a very constructive way of celebrating *Cinco de Mayo*."

The Ninth Circuit's immigration caseload began rising dramatically in 2002 after the Department of Justice directed the Immigration and Naturalization Service to clear a backlog of appeals pending before the agency's Board of Immigration Appeals (BIA). Through expedited reviews, the BIA began terminating cases at a rapid rate, most frequently by denial of residency. Almost as quickly as the BIA closed cases, they were appealed to the Ninth Circuit and other federal circuit courts, most notably the Second Circuit in New York.

In fiscal year 2001, the Ninth Circuit received approximately 954 immigration appeals, amounting to 9 percent of the court's caseload. In fiscal year 2005, there were 6,555 such appeals, which constituted 41 percent of the caseload. Through March of this year, INS cases total 1,449 and account for 39 percent of all filings with the court. The percentage of appeals filed *pro se*, meaning without benefit of legal counsel, has remained consistently in the 35 to 40 percent range.

The majority of immigration appeals, 58 percent thus far in FY2006, are terminated by order, most often prior to the completion of briefing. The remaining cases are decided by memorandum, 41 percent, and opinion, 1 percent. Of the cases decided on the merits, most were denied or dismissed. Only about 14 percent were granted relief.

The court has implemented various innovations to manage the influx of immigration cases. It initially adopted a general order establishing a streamlined notification system for stays of removal and providing for oral extensions of time limits to respond to motions. Extensive screening of immigration cases was begun so that the court could identify and simultaneously process multiple cases having common issues. The court also has sponsored a number of immigration workshops for attorneys new to immigration law and/or appellate practice. And, when available, *pro bono* attorneys were assigned to cases recognized to have merit.

The court's *pro bono* program includes an opportunity to make oral arguments before an appellate panel. Cases are only selected for the program after staff and/or judges have determined that the appointment of counsel is warranted and/or would benefit the court. The court offers assistance with procedural matters, obtaining documents from the record, and generally managing the case. And *pro bono* staff will process all motions filed in program cases, so that the fact that the case is in the program can be factored into rulings on procedural matters where appropriate.

Susan Gelmis, a court of appeals staff attorney who supervises the motions and *pro se* units, led off the panel presentation. Ms. Gelmis said while the court's *pro bono* program has been very successful, the program has certain limitations with respect to the needs of the court in the immigration context. The guarantee of oral argument would not be available for cases in which lawyers are needed to facilitate mediation at the court, rather than briefing on the merits. Further, many cases with merit or potentially meritorious claims are remanded to the agency for further proceedings, and the court does not appoint lawyers for proceedings in other courts or agency proceedings. Finally, many of the *pro b*ono lawyers in the court's program do not have

immigration experience, and would benefit greatly from the availability of experienced mentors and/or training.

Some immigrant appellants would be better served appearing *pro se*, rather than with the lawyers they already have, added Ms. Gelmis. Lawyers who are unprepared and sometime meet their clients only moments before scheduled proceedings are "doing an enormous disservice to their clients, the court and the agencies," she said. The problems have led the court to begin recruiting *pro bono* "*amicus* counsel" to step into particularly problematic cases, she added.

Another panelist, U.S. Immigration Judge Dana Leigh Marks of San Francisco, a former president and current vice president of the National Association of Immigration Judges, offered insight into the demanding work of immigration judges. In her prepared remarks, she mentioned large caseloads, hectic schedules, too few law clerks and frequent language difficulties as among the daily challenges.

Judge Marks described immigration court proceedings a "strange hybrid of administrative, civil, and criminal law." The court is technically an administrative tribunal, but is not governed by the APA, lacks formal discovery and provides for most decisions to be delivered orally.

"When I say orally, I mean these decisions are rendered extemporaneously, immediately following the completion of several hours of testimony, without access to any written transcript of testimony," she said, adding that San Francisco judges render on average 10 such oral decisions per week.

Judge Marks noted that the overwhelming majority of immigration judge decisions never reach the circuit courts. Many are not appealed at all or do not go beyond administrative review by the BIA.

The third panelist was San Francisco attorney Mark Van Der Hout, who specializes in immigration law and sits on the board of governors of the American Immigration Lawyers Association. He encouraged continuing efforts to identify key cases that, once decided, can set precedent guiding the resolution of hundreds of others. Other cases should be held in abeyance until the precedent-setting ones are decided, he added.

Much of the group discussion focused on mentoring and training of *pro bono* attorneys. One suggestion was to look into the mentoring model of the California Appellate Project, where court staff serve as mentors for volunteer attorneys, or to seek possible funding of an independent staff person outside of the court to focus on mentoring. Screening and legal advice for *pro se* cases also was highlighted, along with suggestions to supplement the Ninth Circuit program by adding mediation, amicus briefs, remands to the agency, and more extensive use of law school clinics and *pro bono* agencies. Coordination of all of the many resources gathered at the session is a key to the next step.

Public and non-profit agencies represented at the session included the University of California at Davis School of Law and its Immigration Clinic; the University of Arizona's Immigration Law Clinic; the University of Idaho College of Law's Legal Aid Clinic; the Legal Access Program operated by the U.S. Department of Justice's Executive Office for Immigration Review; the Legal Aid Society of San Diego; the Northwest Immigrant Rights Project in Seattle; the Public Law Center in Santa Ana; the Florence Immigrant and Refugee Rights Project in Arizona; the Los Angeles County Bar Association; the Public Counsel Law Center; and, from San Francisco, the Lawyers' Committee for Civil Rights, the Immigration Legal Resource Center and the Asian Law Caucus.